United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7437

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated; HENRY FLAGG, individually and as President of Flagg Brothers, Inc.; THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.; WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.; THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK; and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

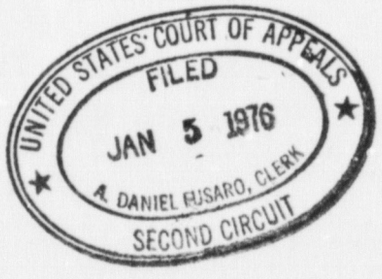
Defendants-Appellees.

- X

On Appeal from the United States District Court for the Southern District of New York

---

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS



The Legal Aid Society of Westchester County
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
Attorneys for Plaintiffs-Appellants
171 East Post Road
White Plains, New York 10601
Tel: (914) 761-9200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated; HENRY FLAGG, individually and as President of Flagg Brothers, Inc.; THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.; WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.; THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK; and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

- X

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Preliminary Statement

This brief is submitted in response to the briefs of defendants-appellees (hereafter defendants).

At the outset, plaintiffs respectfully refer the Court to the recent decision of the Ninth Circuit Court of Appeals in Culbertson v. Leland, __F.2d__,

CCH Pov.L.Rptr. ¶21,681 (9th Cir. No.73-1749 Oct. 3, 1975). The court in Culbertson, by a two to one vote, held that a hotel keeper's seizure of goods pursuant to an innkeeper's lien statute constitutes action under color of state law. The decision in Culbertson is particularly significant because it was rendered by the same court which decided the leading state action repossession case, Adams v. First National Bank, 492 F.2d 324 (9th Cir. 1973), cert.denied, 419 U.S. 1006 (1974).

The Culbertson court found that state action was present because, as in the instant case, the hotel keeper's lien did not exist at common law and was not provided for by contract, and thus could only be exercised under color of the contested lien statute.* "[S]ince

* The court also relied upon the fact that the property seized had no relationship to the debt. The court distinguished the repossession cases, where the creditor had a security interest in the repossessed goods to the extent of the unpaid portion of their purchase price.

the statute was the sine qua non for the activity in question, the state's involvement through that statute is not insignificant." Culbertson v. Leland, supra (slip opinion, p.9). This rationale is directly applicable to the instant case.

Judge Ely, concurring in Culbertson found state action on the ground that the seizure of the goods constitutes the carrying out of a public function. In reaching this conclusion, he relied upon the decision of the Fifth Circuit Court of Appeals in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). The concurring opinion in Culbertson thus supports plaintiffs' position that state action is present because the enforcement of the warehouseman's lien constitutes the carrying out of a public function.*

---

* Judge Choy dissented in Culbertson on the ground that the Ninth Circuit's decision in Adams v. First National Bank, supra was dispositive.

POINT I

THE WAREHOUSEMAN'S POWER TO SELL BAILED GOODS COMES EXCLUSIVELY FROM NEW YORK UNIFORM COMMERCIAL CODE, §7-210 AND THUS CONSTITUTES ACTION UNDER COLOR OF STATE LAW

Defendant Flagg Brothers claims that "the authorities...are not in agreement that the right of sale to satisfy a warehouseman's lien did not exist at common law." Answering Brief for Defendants-Appellees, Flagg Brothers, Inc. and Flagg, p.15.

There is a virtual consensus, however, among the commentators and the courts that the bailee's only right at common law was the right to detain possession of bailed goods until all of the charges allegedly due were paid; he had no right under common law to sell bailed goods. In the recently published third edition of Brown on Personal Property, it is unequivocally concluded that under the common law "the lienor has no right to sell the subject matter of the lien to reimburse himself for his debt unless such right is conferred expressly by statute or by special agreement between him and his debtor." Brown, Personal Property, §13.1, p.394 (3d edition 1975). Id. at §13.1, p. 390, §14.1, pp.446-447. Absent such statutory

or contractual authority, "a sale by the lienor in attempted foreclosure of his lien is, indeed, as to the owner of the goods, a conversion." Id. at §14.1, p.446. All of the other leading commentators have reached the same conclusion. Fryer, Personal Property, pp.392, 418-419 (1938); Comment, Liens - Extent to Which Common Law Artisan's Lien Has Been Supplanted by Statute, 37 Mich. L.Rev. 273, 274-275 (1938); Hall, Possessory Liens in English Law, 67 (1917); Dobie, Bailments and Carriers, §64, pp. 153-154 (1914); Schouler, Personal Property, §§376, 387 (1896); Jones, Liens, §§10, 1033-1034 (1888); Overton, Treatise on the Law of Liens, 200 (1983).* In addition, the United States Supreme Court, the lower federal courts and the New York State Courts have all recognized that the bailee's common law lien right did not extend beyond the right to detain the goods. Knapp Street and Co. v. McCaffrey, 177 U.S. 638, 645 (1900); United States v. Toys of the World Club, 288 F.2d 89, 95 (2d Cir. 1961)(Friendly,J.); Parks v. Mr. Ford, 386

* The quote from Gilmore, Security Interests in Personal Property (1965) relied upon defendant Flagg Brothers on page 16 of its brief is in direct conflict with the above authorities. Gilmore's conclusion is unsupported and he does not attempt to refute the prevailing authorities. He appears to stand alone in the position he has taken.

F.Supp. 1251, 1254-1255 (E.D.Pa. 1975); Wm. Hulse and Co. v. Rand McNally Co., 195 F.Supp. 621, 628 (S.D.N.Y. 1961); Loevenich v. Sack, 274 App.Div. 458, 461, 84 N.Y. Supp. 2d 642 (1st Dept. 1948); Beken v. Kingsbury, 113 App.Div. 555, 100 N.Y.S. 323 (4th Dept. 1906); Hackett v. Nelson Express and Storage Co., 162 Misc. 444, 446, 294 N.Y.Supp. 905 (N.Y.Sup.Ct. 1937); Grafstein v. A. Santini Storage Co., 26 N.Y.S.2d 125, 126 (N.Y.City Ct.), aff'd, 42 N.Y.S. 2d 496 (App.Term 1st Dept. 1941); Weinstein v. Santini Transfer Co., 155 Misc. 139, 141, 278 N.Y.S. 380 (N.Y.City Ct. 1935). See generally, 62 N.Y. Jurisprudence, Warehouse Receipts, §125, p.747.

The common law thus only gave the warehouseman the right to detain possession of the goods. "The method of enforcement at common law is quite imperfect; and here we find a right without its full corresponding remedy." Schouler, Personal Property, §387 (1896). It was only the statutory enactment of the predecessors of section 7-210 of the Uniform Commercial Code which provided the warehouseman with the power to enforce his lien by selling the goods.

In addition, there was no contractual right of sale in the transactions between plaintiffs Brooks and

Jones and defendant Flagg Brothers. The clause in the "Bill of Lading and Freight Bill" relied upon at page 20 of defendant Flagg Brothers' brief only provides for a right of sale where

> "property which has been transported to destination...is refused by consignee or party entitled to receive it upon tender of delivery or said consignee or party entitled to receive it fails to receive it or claim within 15 days after notice of arrival of the property at destination...." (A.17,131)(emphasis added).

This clause has no application to the transactions between plaintiffs and defendants. (Compare the power of sale set forth in the contract alleged to be used generally in the industry, Answering Brief for Defendants-Appellees Flagg Brothers and Flagg, p.22.) There was no refusal or failure by plaintiffs to receive goods upon a tender of delivery at destination. The transactions between plaintiffs and defendants only involved the transportation and storage of plaintiffs goods and defendants' threat of sale under section 7-210 because of plaintiffs' alleged failure to pay all of the warehouse fees.

Defendant Flagg Brothers recognizes that plaintiffs were not bound by this clause since they

"did not sign the form...." Answering Brief for Defendants-Appellees Flagg Brothers and Flagg, pp.20-21.* However, defendant Flagg Brothers apparently claims that it had a contractual right of sale because such a right is, in Flagg's view, a "standard trade practice." Answering Brief for Defendants-Appellees, pp. 21-22.**

---

* Plaintiff Brooks was not given this form until "four days" after defendant moved and stored her goods. Answering Brief for Defendants-Appellees, Flagg, p.6. In addition, the clause would not appear to be binding on plaintiffs because of the fine print of the form, the inequality of bargaining power between the parties, and the fact that defendant does not claim plaintiffs were made aware of the clause. See Fuentes v. Shevin, 407 U.S. 67, 95 (1972). Compare D.H. Overmeyer Co. v. Frick, 405 U.S. 174 (1971).

** Defendant Flagg never expressly asserts that the power of sale is contractual because it is part of the usage of the trade. Defendant only asserts that "an implied storage contract" exists between the parties and that "defendant warehouseman...would expect security in the form of a lien, and plaintiffs would have been agreeable as a condition of storage." Answering Brief for Defendants-Appellees,p.21. (emphasis added). The security consists of the right to retain possession pursuant to section 209 of the Uniform Commercial Code, not the right of sale pursuant to section 210. Nevertheless, plaintiffs are responding to defendants on the assumption that they are asserting that there is an implied contractual power of sale.

The very existence of the statutory power of sale, however, makes it unnecessary for a warehouseman to rely upon an implied contractual power of sale. Because of the statutory power of sale, there is no occasion for the New York courts, in resolving disputes between warehousemen and their customers, to determine if an implied power of sale exists.

This further demonstrates that the statutory power of sale constitutes significant state involvement with the sale of the goods. For a contractual term to be implied because it is the custom and usage of the trade, the warehouseman would have to satisfy the burden of demonstrating factually that his customer had actual knowledge of the usage, or that the usage is so prevelant in the area that he should be charged with such knowledge. 5 Williston, Contracts, §661 pp.108, 113, 117, §662, p.118 (3d edition Jager); N.Y. Uniform Commercial Code, §1-205(2) ("The existence and scope of such a usage are to be proved as facts."). In the case of the low-income consumer, this would be at the very least a heavy burden to meet since "(e)ven though a usage is general in a partic-

ular business, one who is not in that business will not be bound by it, in the absence of knowledge or neglect of duty, to inform himself." Williston, Contracts, supra at §661, p.117. See Culbertson v. Leland, supra (slip opinion, p.10)("...we cannot say with confidence that appellants should have expected appellee Leland to do what she did.") This burden would be particularly heavy in view of the recognition that the lienor has no power to sell unless the power is conferred by statute or by "special agreement" between the warehouseman and the bailor. Brown, Personal Property, §14.1, p.446 (3d edition, 1975). The statutory power of sale thus plays a significant role in the bailor-bailee relationship by relieving the warehouseman of this extremely heavy, if not impossible, burden of proving an implied right of sale.

Defendants had no power of sale either under the common law or pursuant to contract with the plaintiffs. Defendants' threatened sale of plaintiffs' goods was under, and only under, color of section 7-210 of the Uniform Commercial Code. This is "significant" state action.

As the court concluded in Culbertson v. Leland, supra:

> "[W]e disagree with the proposition [set forth in Burke and Reber, Congressional Power and Creditors' Rights, 47 S.Cal.L.Rev. 1, 47 (1973)] that lien statutes which create new rights in favor of creditor[s]...have only a minimal impact on private ordering, expecially when the parties themselves have failed to agree on a like ordering in the particular case." Culbertson v. Leland, supra (slip opinion, p.10).

Defendants also contend that the enforcement of the warehouseman's lien does not constitute the performance of a public function since plaintiffs' goods would be exempt from execution of a judgment. N.Y. CPLR, §5205. Whether or not any of the particular goods involved would be exempt as a matter of state law, however, is not the essential inquiry for state action purposes. Regardless of the exempt or non-exempt status of the goods, however, the critical facts remain that the sale of the goods pursuant to section 7-210 constitutes the execution of a lien, and in New York, "the execution of a lien...traditionally has been the function of the Sheriff." Blye v. Globe-Wernicke, 33 N.Y.2d 15, 20 (1973).

In addition, not all household or consumer goods are automatically exempt. The only clothing and household furniture which are exempt are those which are

"necessary for the judgment debtor and the family." N.Y. CPLR, §5205(5).* The burden is on the judgment debtor to bring himself or herself within the exemption provisions, and the exemptions are waived if they are not timely asserted. 6 Weinstein, Korn and Miller, New York Civil Practice, ¶¶ 5205.06, 5205.08, 5205.09; Gilerwicz v. Goldberg, 69 App.Div. 438, 74 N.Y.Supp. 984 (2d Dept. 1902). Plaintiff Brooks' bar and bar stools, for example, would not qualify for exemption. (A.25). In addition, plaintiff had eleven barrels of unspecified merchandise stored with defendants, (A.25) and plaintiff Jones had "other goods" stored with defendants. (A.84).**

In addition, the household exemptions did not exist at common law. 6 Weinstein, Korn and Miller, New York Civil Practice, ¶5205.05; 9 Carmody-Wait 2d §64.32; Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 696, 151 Misc. 604 (County Ct. 1934). Under common law, the warehouseman often enforced his claim by suing the bailor for the amount of the claim, and then enforcing

---

* An exception to the exemption statute are judgments "recovered by a domestic, laboring person or mechanic for work performed by him in such capacity." N.Y. CPLR, §5205 (a)(b).

** It should also be noted that consumer goods were involved in Hall, Blye and Culbertson.

his judgment by having the sheriff execute on the bailed goods. Brown, Personal Property, §121, pp. 602-603 (2d edition, 1955). The contested statute thus allows the warehouseman to engage in a function which historically belonged to the sheriff.

Defendants improperly contend that the sale provision is "consumer oriented." Answering Brief of Defendants-Appellees Flagg Brothers and Flagg, pp. 22, 34. Sale provisions were enacted because trades such as warehousemen "constituted, and still constitute, special interest groups to which state legislators are traditionally responsive." Brown, Personal Property, §13.1, p.391 (3d edition 1975). When some states enacted the statutory right to enforce a lien by the sale of the goods, they afforded the owner of the goods an opportunity to be heard and required an order of the court. Comment, Liens - Extent to Which Common Law Artisan's Lien Has Been Supplanted by Statute, 37 Mich.L.Rev. 273, 274 (1938). When New York granted warehousemen the power of sale, however, it gave the consumer no more than the right of prior notification. See Robinson v. Wappans, 34 Misc. 199, 200, 68 N.Y. Supp. 815 (1901).* In addition, contrary

* The advertisement requirement is only designed to attract buyers, not to protect the owner of the goods. Hackett v. Nelson Express and Storage Co., 162 Misc. 444, 446, 294 N.Y.Supp. 905 (N.Y.Sup.Ct. 1937).

to defendant Flagg's contention, Answering Brief for Defendants-Appe;;ees. p. 34 n., the power of sale is "in addition to all other rights allowed by law to a creditor against his debtor." N.Y. Uniform Commercial Code, §7-210(7).* A statute which grants a judgment debtor the power to sell all of a person's household goods, including the most essential necessaries for everyday living, and which gives the owner of the goods only the right to be notified of such a sale, cannot be regarded as consumer oriented. As the New York City Court concluded forty years ago:

> "It is a matter of common knowledge that a great many sales are conducted by warehousemen and others in a similar manner and that advantage is thus taken of the needy and helpless who might be incapable of protecting themselves." Weinstein v. Santini Transfer Co., 155 Misc. 139, 142, 278 N.Y.S. 380 (N.Y.City Ct. 1935).

---

* Thus, a warehouseman who sells goods pursuant to section 7-210 may subsequently recover a deficiency judgment against the debtor if the proceeds of the sale are less than the entire debt. 13 Carmody-Wait 2d §§84:95, 84:104 n.10.

Unfortunately, this statement is equally true today.

Affording the owner of the goods an opportunity to be heard prior to their sale accomodates the interests of both the warehouseman and the consumer. It does not deprive the warehouseman of his lien or the means to enforce it. At the same time, an opportunity to be heard protects the owner against a mistaken, arbitrary or otherwise wrongful sale of his goods.*

In sum, defendants have failed to refute plaintiffs' contentions that the warehouseman acts under color of section 7-210 when he sells bailed goods, and that due process requires that an owner of the goods be afforded an opportunity to be heard prior to their sale.

---

* As in Hernandez, the Attorney General relies heavily on Dinny v. Reavis, 100 Misc. 316 (N.Y.Sup.Ct. 1915), aff'd, 178 App.Div. 922 (1st Dept. 1917). The concurring opinion in Hernandez found that "in light of the Supreme Court's recent due process decisions (e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Bell v. Burson, 402 U.S. 535 (1971); Fuentes v. Shevin [407 U.S. 67 (1972)]; the authority of a 58-year old constitutional decision rendered by a state trial court is of doubtful force." Hernandez v. European Auto Collision, 487 F.2d 378, 383 (2d Cir. 1973) (concurring opinion).

POINT II

THIS ACTION IS A PROPER PLAINTIFF AND DEFENDANT CLASS ACTION PURSUANT TO RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In this connection, plaintiffs respectfully refer the court to the recent decision of Judge (now Justice) Stevens of the Seventh Circuit Court of Appeals in Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975). The court in Jimenez held that class certification is important in actions meeting the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure because it avoids unnecessary threats of mootness, Id; at 697 n.14, 700, avoids multiple litigation and provides assurance that the decision of the court will be applied to all persons similarly situated. Id. at 701.

In addition, the Jimenez court held that where the district court fails to determine "as soon as practicable after the commencement of an action" whether the action may proceed as a class action, as required by Rule 23(c)(1) of the Federal Rules of Civil Procedure, and dismisses the action without determining the propriety of the class, if the dismissal of the action is reversed on appeal, the district court can certify the class on remand. Id. at 699. This holding is applicable to the instant case. Since the parties have stipulated to the propriety of

the plaintiff and defendant classes, certification by the district court upon remand from this court cannot prejudice the defendants.

Finally, defendants' contention that a class action is not proper because some persons might not desire a hearing was rejected in Cottrell v. Virginia Electric & Power Co., 62 F.R.D. 516, 519, 522 (E.D.Va. 1974). The Cottrell court concluded that a procedural due process claim involves the opportunity to be heard. It cannot be presumed that a person would rather "waive a [constitutional] right rather than bear proportionally the cost of its provision...." Id. at 522. Indeed, defendants' argument, if accepted, would preclude class action status in all cases involving procedural due process claims. This court has, however, clearly held otherwise. Frost v. Weinberger, 515 F.2d 57, 62-65 (2d Cir. 1975); Escalera v. New York City Housing Authority, 425 F.2d 853, 867 (2d Cir.), cert.denied, 400 U.S. 853 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the action

remanded to that court with directions to declare New York Uniform Commercial Code §7-210 in violation of the Due Process Clause, and to certify the plaintiff and defendant classes.

Dated: December 29, 1975
White Plains, New York

Respectfully submitted,

The Legal Aid Society of
Westchester County
By: Martin A. Schwartz,
of Counsel
Lawrence S. Kahn,
of Counsel
Attorneys for Plaintiffs-Appellants
171 East Post Road
White Plains, New York 10601
Tel: (914) 949-4790

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

SHIRLEY HERRIOT BROOKS, et al.,

Plaintiffs-Appellants,

-against-

FLAGG B[illegible]HERS, INC., et al.,

Defendants-Appellees.

----------x

AFFIDAVIT OF SERVICE BY MAIL

No. 75-7437

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS.:

MARTIN A. SCHWARTZ, being duly sworn, deposes and says that:

I am over the age of 18 years and I am not a party to this action and I reside at 1129 Astor Avenue, Bronx, New York, and that on the 31st day of December, 1975, I served the Reply Brief for Plaintiffs-Appellants on A. Seth Greenwald, Esq., Two World Trade Center, New York, New York; Alvin Altman, Esq., at 1776 Broadway, New York, New York; Norman Weiss, Esq., at 2 West 45th Street, New York, New York; and Arnold Shaw, Esq., at 51 Madison Avenue, New York, New York, attorneys for Defendants-Appellees at the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Martin A. Schwartz

MARTIN A. SCHWARTZ

Sworn to before me, this
31st day of December, 1975.

Jerrold M. Levy

JERROLD M. LEVY
NOTARY PUBLIC, State of New York
No. 24-1500024
Qualified in Kings County
Term Expires March 30, 1977